88-676

Supreme Court, U.S.
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NUMBER:

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JERRY W. IKARD, D/B/A
IKARD MANUFACTURING COMPANY

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Don A. Howard
Uhrig, Munger & Howard
Counsel for Petitioner
3307 Bob Wallace Ave.,
Suite One
Huntsville, AL 35805
(205) 533-2201

Morris "Mo" J. Brooks, Jr.
Co-Counsel for Petitioner
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636

QUESTIONS PRESENTED FOR REVIEW

ULTIMATE QUESTION

Did the United States Court of Appeals for the Eleventh Circuit err in affirming the United States District Court for the Northern District of Alabama's Rule 12(b)(1) and 12(b)(6) dismissal of Petitioner's cause of action?

SUBSIDIARY QUESTIONS

I. Do violations by United States of America employees of due process and equal protection laws guaranteed by a state constitution create a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b)?

II. Are violations by United States of America employees of Federal Statutes, Federal Acquisition

Regulations, and the United States Constitution, in and of themselves, the applicable state law sufficient to create a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b)?

III. Do violations by United States of America employees of Federal Statutes, Federal Acquisition Regulations, and the United States Constitution, create a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), when they are incorporated into a state statute which has been violated?

IV. Did Plaintiff-Petitioner state a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b)?

V (a). Are violations, by United States of America employees, of

Federal Statutes, Federal Acquisition Regulations, the United States Constitution, Alabama Common Law, Alabama Statutes, and the Alabama Constitution excepted by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2680(a)?

V (b). Are violations, by United States of America employees, of Federal Statutes, Federal Acquisition Regulations, the United States Constitution, the Alabama Constitution, and Alabama statutes conduct excepted from the Federal Tort Claims Act 28 U.S.C. 2680(h) under, as Respondent-Defendant contends, the "no analogous private liability exception"?

VI. Does an overlap between two

distinctly separate state tort actions, when one is specifically excepted from the Federal Tort Claims Act by Section 28 U.S.C. 2680(h), create an exception with respect to both such actions?

LIST OF ALL PARTIES

1. Jerry W. Ikard, doing business as Ikard Manufacturing Company, is the Petitioner herein, was Appellant in the Court of Appeals, and was Plaintiff in the District Court. Petitioner, Jerry W. Ikard, is an individual person. Ikard Manufacturing Company is a sole proprietorship wholly owned by Jerry W. Ikard, is the name by which Jerry W. Ikard does business, is not a corporation, and has no parent companies, affiliates, or non wholly-owned subsidiaries or the like.

2. United States of America; is the Respondent herein, was Appellee in the Court of Appeals, and was

Defendant in the District Court.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit, _____ F.2d _____ (1988), entered June 30, 1988, is attached in Appendix A.

The Opinion of the United States District Court for the Northern District of Alabama, _____ F.Supp. _____ (1987),

entered December 31, 1987 and dismissing Petitioner's cause of action under Federal Rules of Civil Procedure Rules 12(b)(1) and 12(b)(6), is attached in Appendix A.

JURISDICTION STATEMENT

Jurisdiction of this Petition for Writ of Certiorari is conferred upon the United States Supreme Court by Section 1254(1) of Title 28 of the United States Code. Review is sought, pursuant to Supreme Court Rule 17.1(c), of the dismissal decree entered on December 31, 1987 by the United States District Court for the Northern District of Alabama and of the order affirming dismissal entered on June 30, 1988, by the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1254(1):

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

15 U.S.C. 637(a)(1): See Appendix.

15 U.S.C. 637(b)(7): See Appendix.

28 U.S.C. 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution,

laws, or treaties of the United States.

28 U.S.C. 1346(b): See Appendix.

28 U.S.C. 2680(a): See Appendix.

28 U.S.C. 2680(h): See Appendix.

Title 48, Code of Federal Regulations:

FAR 9.402(b): See Appendix.

FAR 9.406-2 Causes for Debarment: See Appendix.

FAR 9.406-3(b) Procedures. Decision-making process. See Appendix.

FAR 9.407-2 Causes for Suspension. See Appendix.

DOD FAR Supplement 9.472-2: See Appendix.

Army FAR Supplement 9.493. Debarment and Suspension Procedures. See Appendix.

Article I, Section 1, of the Constitution of Alabama of 1901:

That the great, general, and essential principles of liberty and free government may be recognized and

established, we declare:

Section 1. Equality and Rights of Men. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

Article I, Section 6, of the Constitution of Alabama of 1901:

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:

Section 6. Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy

thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecution by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the

time of the application of the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

Article I, Section 22, of the Constitution of Alabama of 1901:

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:

Section 22. Ex post facto laws; impairment of obligations of contracts; irrevocable or exclusive grants of special privileges immunities. That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

Code of Alabama, 1975, Section 34-3-20(1): It is the duty of attorneys: (1) to support the Constitution and laws of this state and of the United States.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Ikard Manufacturing Company requests the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit directing the Court of Appeals to (1) vacate its Order affirming the Order of the United States District Court for the Northern District of Alabama which dismissed, pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, Plaintiff-Petitioner's cause of action and (2) enter an order reversing and remanding the aforementioned dismissal order and directing the District Court to proceed to trial with the Plaintiff-Petitioner's action.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This action is brought by Jerry W. Ikard d/b/a Ikard Manufacturing Company (hereinafter "Ikard") versus the United States. The Complaint, filed June 16, 1987, claims damages, pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), on the grounds that Ikard had been "blacklisted" and de facto debarred by employees of the United States, that the negligent withholding of evidence and submission of erroneous information in regarding Ikard's debarment proceeding deprived Ikard of due process of law, as guaranteed under Article 1, Section 6 of the Alabama Constitution of 1901, that the length of Ikard's debarrment violated the equal protection of the laws as guaranteed by Sections 1, 6, and 22 of Article 1 of the Alabama Constitution of 1901, that United

States' employees negligent compliance with Federal Regulations constituted negligence and negligence per se under the laws of the State of Alabama, and that the negligence of attorney-employees of the United States violated Section 34-3-20(1), of the Code of Alabama (1975) and constituted negligence and negligence per se. The Complaint was served on the United States in accordance with Rule 4, Federal Rules of Civil Procedure. On August 17, 1987, the United States filed its Rule 12(b)(1) and (6) Motion to Dismiss, stating that Plaintiff failed to satisfy the "law of the place" requirement of 28 U.S.C. 1346(b), that Plaintiff alleged tortious interference with contract rights and misrepresentation, both exempted from the F.T.C.A. by 28 U.S.C. 2680(h), and that the actions of employees of the

United States involved a discretionary function exempted from the Federal Tort Claims Act by 28 U.S.C. 2680(a). On December 31, 1987, the District Court dismissed the action pursuant Rules 12(b)(1) and (6) and adopted Defendant-Respondent's Memorandum of Law as its own.

The United States Court of Appeals, Eleventh Circuit, after Ikard's appeal, affirmed the District Court's dismissal on June 30, 1988.

C. FACTS

Jerry W. Ikard is sole owner of Ikard Manufacturing Company of Meridianville, Alabama. Ikard manufactures machined and electronic items and components utilized for missile and rocket system repair and replenishment by the United States Army. Ikard's primary customer is the U.S. Army Missile Command (hereinafter "MICOM") in Redstone

Arsenal, Alabama. Ikard has been doing business for approximately 20 years with MICOM and has structured its operations to meet the stringent quality control and inspection requirements of United States Department of Defense agencies. Ikard cannot modify its operations to produce commercial parts without a substantial outlay of capital and change in its personnel and general business operations.

In approximately 1977 or 1978, Jerry W. Ikard had personality conflicts with MICOM employees in its Repair Parts Branch of the Procurement and Production Directorate and, consequently, several MICOM employees were "out to get him" or "put him in his place". Relations between Ikard and MICOM employees deteriorated.

Ikard was delinquent on many contracts. However, as opposed to many

of his competitors, MICOM employees strictly construed contracts against him and terminated them for default while competitors with equal or longer delinquencies were allowed to complete their jobs. These default terminations caused Ikard cash flow problems which, in turn, exacerbated the conflicts between Ikard and MICOM employees. The more Ikard complained, the more stringent and harsh MICOM employees became with him.

In 1986, a former MICOM employee affidavit stated that, in late 1981, MICOM supervisory employees promulgated a list of "problem contractors". Ikard's name was on the list. These supervisors told their employees to avoid awarding contracts to Ikard if at all possible. Such conduct violated Subpart 9.4 of the Federal Acquisition Regulations (hereinafter "FAR") and its

predecessors (Defense Acquisition Regulations and Armed Services Procurement Regulation). From information obtained pursuant to the Freedom of Information Act (hereinafter "FOIA"), Ikard discovered that MICOM employees attempted to have Ikard formally debarred every year from at least 1981 through 1984 (when they obtained a one year debarment). In addition to the formal one year debarment, Ikard was suspended for the six months preceding the debarment. Ikard was unable to market, as a contractor or subcontractor, to its only major customer for 18 months.

Ikard contends MICOM employees violated numerous sections of the FAR, to-wit: Section 9.402(b) [debarment is for protection of the Government's interest, not for punishment], Section 9.406-3(b) [debarment procedures must be

"consistent with principles of fundamental fairness"], Section 9.472-2 (DOD supplement) [the MICOM administrative report compiled for the debarring official should contain a summary of "all pertinent evidence"], and Section 9.493 (Army supplement) [debarment proceedings are "non-adversarial in nature"; no regulations provide for discovery by Ikard].

The suspension and debarment of Ikard caused substantial damage.

Ikard was suspended and debarred because of "a history of failure to perform or unsatisfactory performance of one or more contracts." MICOM employees negligently withheld information that there had been 6 entities debarred for a history of failure to perform out of 168 debarred firms and individuals. Of the six, several were in bankruptcy when failing to perform. The overwhelming

majority were for criminal conduct.

MICOM employees negligently withheld information proving that several MICOM contractors had performance records and delinquency histories similar or worse than Ikard's and proving that Ikard had an excessively large number of pre-award surveys, i.e., ten times as many as the contractor with the next largest number.

These pre-award surveys contributed to Ikard's delinquencies by requiring scarce management time. A pre-award survey can take 2 to 3 days and causes disruptions for small businesses like Ikard.

MICOM employees negligently gave an erroneous Ikard delinquency rate to the Army Debarring Official.

15 U.S.C. 637(b)(7) requires the Small Business Administration (hereinafter "SBA") to be the sole and final determinant of the responsibility of

small business concerns. U.S. Army officials and employees negligently failed to do so. Ikard requested restoration of its security clearance on January 10, 1986. Contractors with no history of a security clearance have had their clearances approved in a matter of days. Ikard's was restored 5 months later on June 2, 1986.

In December, 1986, MICOM solicited contract DAAH01-87-R-0091 (TOW-2 missile cable assemblies) and a MICOM employee told the SBA Ikard was "blacklisted" by MICOM. Blacklisting is prohibited by federal statutes and regulations.

Ikard was unaware of these facts until it received FOIA documents FOIA in February, 1986. On June 18, 1986, Ikard submitted its Administrative Claim pursuant to the Federal Tort Claims Act for Five Million Dollars. This claim was denied December 31, 1986.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

I. VIOLATIONS BY UNITED STATES' EMPLOYEES OF DUE PROCESS AND EQUAL PROTECTION LAWS GUARANTEED BY A STATE CONSTITUTION CREATE A CAUSE OF ACTION UNDER THE FTCA, 28 U.S.C. 1346(b).

Ikard complains of due process and equal protection violations protected by the Constitution of Alabama, 1901, Sections 1, 6, and 22 and by Alabama courts. These Alabama rights are analogous or identical to the United States' Constitution's due process and equal protection clauses. Alabama's Due Process clause applies in civil cases. Pike v. Southern Bell Telephone & Telegraph Co., 263 Ala. 59, 81 So.2d 254 (1955); Smith v. Burton, 283 Ala. 391, 217 So.2d 540 (1968); Ross Neely Express, Inc. v. Alabama Department of Environmental Management, 437 So.2d 82 (Ala. 1983).

Likewise, equal protection rights guaranteed under the Federal Constitu-

tion are analogous or identical to rights guaranteed by the Alabama Constitution. See Ford v. State, 356 So.2d 720 (Ala.Crim.App. 1978), cert. denied, 356 So.2d 723 (Ala. 1978); Tartar v. James, 667 F.2d 964 (11th Cir. 1982); Black v. Pike County Commission, 360 So.2d 303 (Ala. 1978), aff'd, 375 So.2d 255 (1979); Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939).

Does a violation of due process and equal protection rights protected by Alabama's Constitution and courts create a Federal Tort Claims Act (FTCA) cause of action? Yes. While some courts hold that a Federal Constitutional Tort does not, by itself, create a FTCA cause of action, there is no holding deciding whether a State Constitutional Tort (or a Federal Constitutional Tort analogous or identical to provisions of a State Constitution) creates a Federal Tort

Claims Act cause of action. There are decisions suggesting that the existence of "analogous state duties" causes the FTCA to come into play.

In Art Metal-USA, Inc. v. United States, 753 F.2d 1151 (D.C.Cir., 1985), the Court, at 1157, stated that "the violation of the Federal Statute by Government Officials does not **of itself** create a cause of action under the FTCA." (emphasis added). The Court at 1157 added that "duties set forth in federal law do not automatically create a duty cognizable under local tort law. **The pertinent inquiry is whether the duties set forth in the Federal law are analogous to those imposed under local tort law.**" (emphasis added). The Court cited Zabala Clemente v. United States, 567 F.2d 1140 at 1149 (1st Cir., 1977) ("even where specific behavior of Federal employees is required by Federal

Statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability."). Art Metal added, at 1157:

> [Federal] Regulations may nevertheless be important in determining whether the Government may be liable for negligence under the FTCA. First, the regulations may provide evidence that the Government has assumed duties analogous to those recognized by local tort law...

and at 1159:

> If the pertinent regulations are found to have imposed a duty analogous to a local law duty, the regulations also may provide the standard and care against which the Government's conduct should be assessed. See Canadian Transport, 663 F.2d 1081 (Breach of Tort Duty "may be proven in an action against the United States by reference to standards applicable to individual employees"); Swaboda v. United States, 662 F.2d 326, 330 (5th Cir., 1981) (conduct of FAA Air Controllers can be assessed with relevance to FAA Manuals), cert. denied 457 U.S. 1134 (1982). Moreover, depending on the jurisdiction and the law violated, the latter inquiry may result in the conclusion that violation of the relevant law constituted negligence per se. Schindler, 661 F.2d 561.

The Court summarized that "The correct analysis, then, is to ask whether a cause of action exists under District of Columbia law for the injuries Art Metal alleges." After discussing the failure of Government Officials to give Art Metal due process required by procurement regulations and the deprivation of Art Metal's liberty interests, the Court found these were rights guaranteed under the United States Constitution, not under District of Columbia law. In this action, and in contrast to Art Metal, due process and equal protection are rights protected under local law (Sections 1, 6, and 22 of Article I of the Constitution of Alabama of 1901). Under Art Metal, Ikard's FTCA suit should have survived a Rule 12(b)(1) and (6) motion to dismiss.

The same result was found in Donahue v. United States, 459 F.Supp. 455

(D.C.E.MI 1978) where the Court held violation of debarment and suspension regulations by Federal employees was negligence per se under Arizona law. Ibid at 468. The duties in Donahue derived solely from Federal Regulations protecting the individual subject of the debarment and suspension actions.

In Myers v. Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2nd Cir., 1975), the Court discussed whether refusal to grant a hearing in a debarment matter was an FTCA cause of action. The key question is whether "the laws of the locus of this action would provide for recovery where a firm is black-listed or debarred from contracting without being provided an opportunity to appeal and challenge the reasons for that action." 527 F.2d at 1260. Neither party briefed whether blacklisting or debarrment without a

hearing granted an FTCA cause of action. The Court stated "We do not, however, at this point, consider by any means frivolous the Appellant's argument that blacklisting without a hearing is tortious conduct." and added, at 1260 and 1261:

> Accordingly, appellants may well be able to show the Postal Service action here was a "wrongful act" constituting the tort of interference with a business opportunity or prospective advantage... It is also possible that the failure of the Postal Service to comply with its own regulations, to provide a hearing before taking action constituting debarment may be treated under state law as negligence per se. In cases where a law is designed for the protection of a given class of persons, its violation results in injury to a member of that class, at least some states will find that the statutory violation is evidence of a breach of due care, even if not negligence per se.

Similarly, in Cecile Industries, Inc., and John Miller v. United States, 793 F.2d 97 (3rd Cir., 1986), failure to follow procurement regulations was not

shown to constitute negligence under Pennsylvania law. There was no discussion of whether analogous duties under any Pennsylvania law required was similar to fundamental fairness and due process as set forth in federal procurement regulations and the United States Constitution.

In Avery v. United States, 434 F.Supp. 937 (D.C.Conn., 1977), an action against the United States to recover under the FTCA for injuries sustained as a result of Government agents illegally opening his mail, Avery sued for a Constitutional tort (invasion of privacy prohibited by the Fourth Amendment). The Court appeared to conclude that violation of a United States Constitution provision is a tort pursuant to Connecticut local law.

Since Ikard alleges a violation of equal protection and due process, rights

protected by Alabama law, Ikard properly alleged a violation of the FTCA and the District Court's dismissal is error.

II. FEDERAL STATUTES, FEDERAL ACQUISITION REGULATIONS, AND THE UNITED STATES CONSTITUTION ARE, IN AND OF THEMSELVES, THE APPLICABLE STATE LAW UNDER THE FTCA AND THEIR VIOLATION BY UNITED STATES' EMPLOYEES IS SUFFICIENT TO CREATE A CAUSE OF ACTION UNDER THE FTCA.

While some decisions find a FTCA remedy when violations of Federal statutes and regulations by Government employees are based on analogous state duties, others make no reference to analogous duties and hold that Federal law is the applicable local law. Under these holdings, Ikard's FTCA claim is valid since he alleges violations of the United States Constitution, a federal statute or a federal regulation.

Hatahley v. United States, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956), concerns Department of the

Interior Range Managers who wrongfully, negligently and discriminatorily removed horses of the Plaintiff Navajo Indians (who grazed them freely on the range). The Range Managers destroyed Plaintiffs' horses pursuant to a state statute which provided that "abandoned horses on the open range could be eliminated." The District Court awarded damages for violations of the Taylor Grazing Act. The Court of Appeals reversed, holding the Range Manager acted pursuant to state statute, the Government agent's actions were authorized and the question of liability under the FTCA did not have to be decided. The Supreme Court reversed and held that Federal employees and agents did not comply with a Federal statute, the Taylor Grazing Act and its regulations <u>regardless of state law</u>. The applicable Federal law was "the law of the range and the activities of

Federal Agents are controlled by its provision." 76 S.Ct. at 750. The Federal Government was liabile for "wrongful and tortious acts of its employees committed in an attempt to enforce a Federal Statute which they administered." 76 S.Ct. at 750.

In Schindler v. United States, 661 F.2d 552 (6th Cir., 1981), at 560, the Court, with respect to the duty element of a cause of action for a tortious injury, stated:

> ... the federal regulatory statutes may be relevant in defining the scope of the undertaking of the United States and the Plaintiff's right to rely thereon, if the action is based on alleged failure of the United States to observe its own regulations. The federal regulation or statute may also be relevant in assessing the second element of the cause of action, if, under state law criteria, it may be considered the kind of statute or regulation violation which is negligence per se.

While discussing Section 323 of the Restatement of Torts 2d (undertaking of

obligations gratuitously or for consideration), the Schindler Court, at 561, stated:

> ... the trial court in applying the FTCA should look to the regulatory statute involved or the actual conduct of the United States to determine if it has undertaken gratuitously or for consideration to render services to the plaintiff, such as would be the basis of liability of a private person under like circumstances.

Similarly, relevant information to Ikard's debarment was completely in the hands of employees of the U.S. Army Missile Command (MICOM) and Ikard was totally dependent upon these employees to compile the Administrative Report for the Debarring Official.

In that non-adversarial administrative hearing, Defendant's employees undertook to investigate all matters relevant to Ikard's debarment, causing Ikard to believe that all pertinent evidence required by applicable regulations had

been furnished to the Debarring Official. Plaintiff discoverd after the debarment had run that MICOM employees withheld evidence relevant to his delinquency rate and indicating that his delinquency rate was better than those of other contractors not targeted for debarment. Such evidence is pertinent to the Debarring Official's decision and would have assisted Ikard. This action deprived the administrative hearing of due process, fundamental fairness, and equal protection safeguards.

In Betesh v. United States, 400 F.Supp. 238 (D.C. 1974), the Court held that violation of a Federal Regulation (directing Selective Service examining physicians to advise rejected examinees needing medical attention to seek physician advice) could be the basis for FTCA liability. Under applicable state law, "a federal regulation presumptively

establishes a standard of care" and "establishes a presumption of breach of duty." Ibid., at 243. Accord, Hatahley, supra; Rayonier, Inc. v. United States, 352 U.S. 321, 77 S.Ct. 374 (1957).

In Harr v. United States, 705 F.2d 500 (D.C.Cir., 1983), a pilot brought an FTCA suit because the Federal Aviation Administration denied him a medical certificate qualifying him to resume flying duties. Harr alleged that the FAA negligently examined him and added another disqualifying ground without a reasonable, supporting medical basis and failed to inform him of the additional qualifying ground until immediately prior to his flight status fitness hearing. The District Court granted a Motion to Dismiss. Harr appealed. The Court of Appeals reversed. The Court of Appeals held that FAA regulations create

a duty from the FAA to Harr and that the FAA, through its medical staff, breached its duty by not applying its regulations in a careful manner.

In another category of cases involving violations of federal regulations and statutes by government employees, Courts have held that violations of regulations and statutes constitute negligence under the FTCA pursuant to doctrines such as the "Good Samaritan Doctrine" or by inviting reliance by a foreseeable victim pursuant to a gratuitous undertaking. See S.A. Empresa de Viacao Aerea Rio Grandense v. United States, 692 F.2d 1295 (9th Cir., 1982); United Scottish Insurance Company v. United States, 614 F.2d 188 (9th Cir., 1979), and United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 104 S.Ct. 2755 (1984).

III. VIOLATIONS OF THE UNITED STATES

CONSTITUTION, STATUTES AND REGULATIONS CREATE A FEDERAL TORT CLAIMS ACT CAUSE OF ACTION WHEN THEY ARE INCORPORATED INTO A STATE STATUTE WHICH HAS BEEN VIOLATED.

Alabama law requires attorneys to obey the constitutions and statutes of the United States and State of Alabama and to obey United States regulations having the force and effect of law. Section 34-3-20(1), Code of Alabama, (1975), entitled "Duties of Attorneys", states:

> It is the duty of attorneys: (1) to support the Constitution and the laws of this state and of the United States.

Federal Procurement Regulations have the force and effect of law. Paul v. United States, 371 U.S. 245, 255 (1963); Scanwell Laboratories, Inc. v. Schaeffer, 424 F.2d 859 (D.C.Cir., 1970). Negligence per se, in which a duty is created by statute or regulation, is an Alabama tort. Lowe v. General Motors Corp., 624 F.2d 1373, 1380 (5th Cir. 1980), states:

> Alabama law ... states that violation of a statute is negligence per se if the following criteria are met: (1) The trial judge must determine as a matter of law that the statute was enacted to protect a class of persons which includes the litigant seeking to assert the statute. (2) The trial judge must find the injury was the type contemplated by the statute. (3) The party charged with negligence must have violated the statute. (4) The jury must find the statutory violation must have proximately caused the injury.

Fox v. Barthoff, 324 So.2d 294, 295-296 (Ala.S.Ct. 1979). Attorneys who were employees of MICOM violated (1) the due process clause of the United States Constitution and the Constitution of Alabama of 1901 (Article I, Section 6), (2) equal protection of the laws of the United States Constitution and Sections 1, 6, and 22 of Article I of the Alabama Constitution, 1901, (3) Subpart 9.4 of the Federal Acquisition Regulation (FAR) and Subpart 9.4 of the DOD FAR supplement (particularly DOD FAR supplement 9.472-2(h)'s requirement that the Army

forward administrative reports on a proposed debarment containing a complete summary of all pertinent evidence), and (4) 15 U.S.C. 637(a) of the Small Business Act. Violation by an attorney of a federal regulation, the Small Business Act, the Constitution of Alabama and the Constitution of the United States constitutes negligence per se under Alabama Law. In accordance with Art Metal and Myers & Myers, Inc., supra, the breaches of federal duties are also a breach of Section 34-3-20(1), Code of Alabama (1975). Thus duties under Alabama law exist whereas they did not in the District of Columbia, Pennsylvania and New York cases.

Legal malpractice is an Alabama tort and has three elements: (1) duty, (2) breach of duty and (3) damages caused by the breach. Malloy v. Sullivan, 415 So.2d 1059 (Ala.S.Ct., 1982). Courts

use any of four tests to determine legal malpractice duty: privity of contract, gratuitous undertaking, third party beneficiaries, and foreseeability.

Privity of contract and gratuitous undertaking establish a duty. Guidance for whether Alabama will accept the third party beneficiary rule or the foreseeability rule is found in Malloy v. Sullivan, 415 So.2d 1059, 1060 (Ala.S.Ct. 1982): **"The principle which governs a legal malpractice action based upon negligence is the same as any other negligence action**, the Plaintiff having the burden of proving a duty, its breach which caused injury, and damages." (emphasis added).

Since negligence principles of legal malpractice actions are the same as any other negligence action, the task is to determine the duty threshold in Alabama negligence actions. In Buchanan v.

Merger Enterprises, 463 So.2d 121, 125-126 (Ala.S.Ct. 1984), the Court stated:

> The threshold issue in determining whether a common law negligence action will lie is to determine whether the Defendant owed a duty to a class of persons which included the deceased. The duty issue is essentially a public policy question, i.e., whether the law should impose a requirement on the Defendant that it do or refrain from doing some act for the safety and well-being of the Plaintiff . . . Today there is no requirement of privity between the seller and the injured party in order for an action to lie . . . **The ultimate test of the existence of a duty to use due care is found in the standard and foreseeability that harm may result if care is not exercised.** (emphasis added).

See also Bush v. Alabama Power Company, 457 So.2d 350 (Ala.S.Ct.).

Havard, Palmer & Baker Engineers, Inc., 302 So.2d 228 (Ala.S.Ct. 1974), an action against professional engineers for negligent performance of a tunnel inspection contract with the City of Mobile, Alabama, analyzed engineers' duties to an unrelated third party.

Liability rested on foreseeability of harm to persons who might be injured rather than on privity of contract.

In Berkel & Company Contractors v. Providence Hospital, 454 So.2d 496 (Ala.S.Ct. 1984), Providence contracted with Greenhut to build a new hospital wing. Greenhut subcontracted to Berkel installation of piling supports. When soil conditions slowed installation, Berkel sued Providence for breach of duty of care, negligence, fraud, and misrepresentation. A summary judgment in Providence's favor on lack of privity grounds was reversed, at 501:

> Alabama Courts have rejected the absence of privity of contract as a defense to a negligence action. In Federal Mogul Corp. v. Universal Construction Company, 376 So.2d 716 (Ala.Civ.App. 1979), the Court of Civil Appeals held:
>
> > Our cases hold that, where the charge of negligence is based upon breach of duty arising out of a contractual relationship, no cause arises in favor of one not in privity to the contract. However,

> there are exceptions, such as where there is an evasion of the duty independent or concurrent with the contract . . . **Plaintiff may nevertheless recover for negligence for Defendant's breach of duty where Defendant negligently performs his contract with knowledge that others are relying on proper performance and the result is reasonably foreseeable.** (emphasis added).

These same factors in Biankanja v. Irving, 49 Cal.2d 647, 323 P.2d 16 (1958) imposed a duty on a layman to beneficiaries of a will prepared by the layman. This test (less moral blame) was extended in Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rep. 821, 364 P.2d 685 (1961), cert. denied 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962) to include legal malpractice claims.

Attorneys for MICOM could reasonably foresee that Ikard was relying on them to properly perform their duty to prepare an Administrative Report in compliance with procurement regulations

and the Alabama and United States Constitutions. Their failure to do so is, under Alabama law, negligence actionable under the FTCA.

IV. PLAINTIFF-APPELLANT STATES A CAUSE OF ACTION UNDER THE FEDERAL TORT CLAIMS ACT 28 U.S.C. 1346(b).

Congress's purpose for the FTCA was to provide a meaningful and effective remedy for those injured by negligent or wrongful acts of Government employees. In its absence, a Claimant so harmed would suffer loss with no ability to obtain recompense or justice.

Brown v. United States, 653 F.2d 196 (5th Cir., 1981), at 198:

> . . . Recognizing that those who act for the State are fallible, that Public Servants in the course of their duties injure others, and that the polity should redress such harm, Congress partially waived the United States Sovereign Immunity from Tort Claims by enacting the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et. seq.

In Myers & Myers, supra, the Court

discussed whether refusal to grant a debarment hearing granted a FTCA cause of action and concluded that applicable state law controlled. Sections 1, 6 and 12 of Article I of the Constitution of Alabama, 1901, provide protections afforded by due process and equal protection of the laws. In Alabama, even absent federal regulations and the United States Constitution, Ikard should have had a hearing comporting with due process before debarment and suspension. This was not done.

While Ikard utilizes Appellee's employees' violation of federal procurement regulations to help establish his cause of action, their breach is not the only basis for his complaint. As set forth above, legal malpractice is a tort in Alabama. Malloy v. Sullivan, supra. Legal malpractice is established by violation

of Section 34-3-20(1), Code of Alabama, 1975, and negligent investigation, collection and forwarding of all evidence pertinent to the non-adversarial hearing. MICOM attorneys could reasonably foresee that failure to forward all relevant, accurate evidence could result in harm to Ikard.

Likewise, negligence is an Alabama tort. Appellee's employees' negligence in investigating, collecting and furnishing evidence to the Army Debarring Official and their failure to comply with federal statutes and regulations designed to protect persons in Ikard's position meets Alabama's foreseeability test. See Buchanan v. Merger Enterprises, Inc., supra; Bush v. Alabama Power Company, supra; and Havard v. Palmer & Baker Engineers, Inc., supra. Appellee's attorneys and employees had a duty to comply with all

applicable federal procurement regulations and statutes. These federal regulatory statutes define the requirements of Respondent's employees in regard to the formal debarment of Ikard as well as the de facto debarment of Ikard. See Schindler v. United States, supra; Downs v. United States, supra; Betesh v. United States, supra.

In addition, the violation of Section 34-3-20(1), Code of Alabama, 1975, by attorney-employees of Respondent constitutes negligence per se under Alabama law. See Lowe v. General Motors Corporation, supra.

In Alabama, too, it is a tort for a party to voluntarily undertake to perform an act and then fail to perform the act as a reasonably prudent person would. The employees of Respondent who undertook to formally debar Ikard and prepare the administrative report

ostensibly containing all pertinent evidence for the non-adversarial debarment hearing were obligated to proceed in performing those acts and duties as a reasonably prudent person would. They undertook to protect Ikard's interests in the investigation, collection and furnishing of all pertinent evidence bearing on Ikard's debarment (all of which was in their hands).

In Walden v. Unites States Steel Corporation, 759 F.2d 834 (11th Cir., 1985), Walden was killed in a mine while an employee of Cowin & Company. The mine was voluntarily inspected by U.S. Steel. U.S. Steel's voluntary inspections could be the basis for a negligence action, at 837:

> Under Alabama law, once a person voluntarily undertakes safety inspections, he must act as a reasonably prudent person regardless of whether he originally intended to assure the

safety of anyone other than himself. See Beasley v. MacDonald Engineering Co., 287 Ala. 189, 192-194, 249 So.2d 844, 846-848 (1971).

Further, in D. L. Parker v. Thyssen Mining Construction, Inc., 428 So.2d 615, 618 (Ala.S.Ct. 1983):

> Alabama recognizes that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith. Dailey v. City of Birmingham, 378 So.2d 728 (Ala. 1979); United States Fidelity and Guaranty Company v. Jones, 356 So.2d 596 (Ala. 1978). However, the existence of a voluntarily assumed duty through affirmative conduct is a matter for determination in light of all the facts and circumstances. Professor Prosser noted that "[J]ust when the duty is undertaken, when it ends, and what conduct is required, are nowhere clearly defined, and perhaps cannot be." W. Prosser, Handbook of the Law of Torts, Section 56, at 344 (4 Ed. 1971).

See Stauffer Chemical Company v. W. D. Brunson, 380 F.2d 174 (5th Cir., 1967).

The Restatement of Torts, Second Edition, defines duty in Section 323:

> Negligent Performance of Undertaking to Render Services. One who

> undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to the liability for the physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Similarly, in Section 324(a):

> Liability to Third Person for Negligent Performance of Undertaking. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from this failure to exercise reasonable care to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of such harm,
>
> (b) he is undertaking to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Alabama's Voluntary Act Doctrine imposes a duty on Appellee's officers, employees and attorneys to act as a reasonably

prudent person would regardless of whether they were acting voluntarily or pursuant to federal statutes and regulations. Simply put, the existence of federal statutes and regulations is not relevant to liability imposed by Alabama's Voluntary Act Doctrine and, as such, Respondent is liable under the FTCA just as a private person would be under the law of Alabama.

V(a). VIOLATIONS BY UNITED STATES' EMPLOYEES OF FEDERAL STATUTES, FEDERAL ACQUISITION REGULATIONS, THE UNITED STATES CONSTITUTION, ALABAMA STATUTES, ALABAMA COMMON LAW OR THE ALABAMA CONSTITUTION ARE NOT EXCEPTED UNDER THE FTCA AS AN EXERCISE OF A DISCRETIONARY FUNCTION.

The lower courts adopted Respondent's use of 28 U.S.C. 2680(a)'s exception to the FTCA prohibiting claims based on a "discretionary function". Ikard counters that governmental discretion exists for decisions on how to best accomplish the job at hand (See Dalehite

v. United States, 436 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)) but not to conduct which has is no discretion. Particularly appropriate is Avery v. United States, 437 F.Supp. 937 (D.C.D.Conn. 1977):

> Regardless of the level or context of a particular Government act, however, the official involved must act in accordance with certain limits within his discretion. It is true that Section 2680(a) excepts the Government from liability for officials performing discretionary functions, "whether or not the discretion involved be abused." **But there is a difference between discretion and lack of discretion.** An official who abuses discretion by acting arbitrarily or discriminatorily, for example, will be protected by 2680(a). But an official with no discretion in a particular area has no discretion to abuse; he can only act in excess of his authority. (emphasis added).

Avery analyzed Hatahley v. United States, supra (which held that wrongful trespasses by federal agents did not involve discretion and gave rise to claims cognizable under the FTCA) and commented, at 434 F.Supp. 844:

> If trespasses and violation of Government regulations are not "discretionary functions," then, a fortiori, trespasses in violation of constitutional guarantees are not "discretionary functions." See Simons v. United States, 413 F.2d 531 (5th Cir. 1969); DeBonis v. United States, 103 F.Supp. 123 (W.D.Penn. 1952) (dictum); C.F. Kiiskilave v. United States, 466 F.2d 626 (7th Cir., 1972).

Further, in Myers & Myers, Inc. v. United States Postal Service, supra, the Government argued that the granting or denial of contracts was a "discretion in function". The Court was not persuaded and reasoned, at 527 F.2d 1261:

> The Government renews its argument that the "discretionary function" applies. But here the Appellant's argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment form Government contracting. **It is, of course, a tautology that a Federal Official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority . . . This distinguishes cases . . . which hold that even though discretion is abused, its exercise cannot give rise to a Federal Tort Claim . . . For here, the Appellant's claim is**

that the Postal Service lacked discretion to act in disregard of its own applicable regulations and of the Constitution. (emphasis added).

As the cases note, it is Marbury v. Madison, 1 Cranch 137, 170, 2 L.Ed. 60 (1803), which provides authority for the general proposition that a Government Official cannot have discretion to commit unconstitutional or illegal acts.

These cases buttress Ikard's position that government's employees have no discretion to violate Alabama law, Federal statutory law, the Alabama Constitution, the United States Constitution or applicable Federal Acquisition Regulations. In the absence of discretion, U.S.C. 2680(a)'s "discretionary function" exception is inapplicable as a defense.

V(b). VIOLATIONS BY UNITED STATES' EMPLOYEES OF FEDERAL STATUTES, FEDERAL ACQUISITION REGULATIONS, THE UNITED STATES CONSTITUTION, ALABAMA STATUTES, ALABAMA COMMON LAW OR THE ALABAMA CONSTITUTION ARE NOT EXCEPTED UNDER

THE FTCA AS PART OF THE "NO ANALOGOUS PRIVATE LIABILITY" EXCEPTION.

The lower courts accepted Respondent's arguement that Ikard failed to meet 28 U.S.C. 1346(b) requirement that liability exist "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". In Cerri et. al. v. United States, 80 F.Supp. 831, N.D.Cal., S.D. (1948), a bystander was wounded by a shot fired by a soldier on guard duty attempting to halt a civilian under arrest. The United States denied liability because, under California law, "the sovereign police power cannot be delegated to a private individual and therefore, no private individual is liable for the tortious acts of a special policeman employed by him when such acts are committed by such employee

while acting in the line of his duty as a police officer.", at 833.

The Court rejected the government's argument, at 833:

> The defense that this act does not apply to those cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. **Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress.** Certainly the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature, nor does it include within the claims exempted, 28 U.S.C.A. Section 943, those of this type.
>
> There can be no allegation that the Federal Tort Claims Act constitutes a delegation of sovereign power to any private individual. Read full, the act is the simple giving of the consent of the United States to tort actions against itself.
>
> **The phrase " * * * where the United States, if a private person, would be liable * * * ,"** 28 U.S.C.A. Section 921 and Section 931 [now 1346(b)], **is not to be understood to mean that the**

United States can be sued only if a private person can be sued under the identical circumstances. This phrase does not determine the relationship of the government to its employees, but rather determines the relationship of the government to third parties. **The act gives the consent of the United States to be treated by the injured party as if it were a private individual, amenable to court action without claim of immunity, in all those cases, not exempted by the act, where the negligence of its agents, servants or employees has caused injury or damage to third parties.** (emphasis added).

In Betesh v. United States, supra, violation of a Federal Regulation could be the basis for liability under the FTCA. In response to the claim that no analogous private liability could exist because no private doctors were subject to the regulation, the Court found that "like circumstances" does not require that "every aspect of a cause of action be identical to an action between private parties." Ibid., at 244. Courts should take into account aspects unique to Governmental functions such as

Governmental regulations. See Hatahley, supra; Rayonier, Inc. v. United States, 352 U.S. 321, 77 S.Ct. 374 (1957).

Ikard submits the lower courts' interpretation of the "analogous private person liability" requirement is contrary to Betesh, supra, and Cerri, supra, and thwarts the intent of the FTCA by blocking relief to third parties who are wrongfully injured by government employees. Cerri, supra, stated at 80 F.Supp. 833, "Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress."

VI. A PARTIAL OVERLAP BETWEEN TWO TORT ACTIONS DOES NOT SUPPORT A CONCLUSION THAT IF ONE IS EXCEPTED UNDER THE FTCA, THE OTHER MUST BE AS WELL.

Respondent's Motion to Dismiss stated that "Plaintiff's allegations all arise

out of tortious interference with contract rights and misrepresentation, both of which are expressly excepted from the provisions of the FTCA, 28 U.S.C. 2680(h)." An overlap between two tort actions does not support a conclusion that if one is excepted under the FTCA the other must be as well. See Block v. Neal, 460 U.S. 289, 103 S.Ct. 295 (1983). Taking Appellee's argument to its extreme would mean that any tortious conduct which also violates debarment regulations or deprives property or liberty interests without due process of law falls under interference with contractual relations.

A broad definition of misrepresentation will also shield the Government completely from any liability. The gist of Ikard's cause of action is the negligent investigation and collection of pertinent evidence for the report to

the Debarring Official, the negligent investigation and collection of evidence regarding Ikard's contract with MICOM, and the negligence of employees, attorneys and agents of MICOM who did not comply with applicable provisions of federal regulations, Federal statutes and the Constitutions of the United States and Alabama.

While misrepresentation and negligence claims might have a common basis, "Neither the language nor history of the act suggests that when one aspect of the Government's conduct is not actionable under the 'misrepresentation' exception, a Claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct." Block v. Neal, supra, at 104 S.Ct. 1094.

In Block, Plaintiff received a loan from the FHA to finance the construction of a new home. Regulations required the

FHA to provide technical assistance to the borrower, to review the construction plans and contract, and to make inspections. After moving into the house, Neal discovered defects and asked the FHA to pay to correct them. Upon refusal, Neal sued under the FTCA and alleged the defects were caused by the FHA's negligence in inspecting and supervising construction. The issue was whether the action was barred under Section 2680(h) as a "claim arising out of . . . misrepresentation." The Court distinguished United States v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed. 614 (1961), a case involving a pre-purchase inspection and appraisal of the home by FHA, and found that the gravaman of the action in Neustadt was the Plaintiff's being mislead by a Government appraisal. Neustadt alleged no injury independent of reliance on the erroneous appraisal.

In contrast, the Government's misstatements were not essential in Neal's claims and the Court stated that the Government's duty to use due care in supervising and inspecting construction is "distinct from any duty to use due care in communicating to respondent." 460 U.S. at 297.

Because Neal sought to recover for a breach of duties distinct from duties forming the basis for a claim barred by Section 2680(h), her claim was lawful.

Likewise, Ikard seeks recovery for breach of duties distinct from misrepresentation or a tortious interference with contractual relations.

The Alabama tort of intentional interference with business or contractual actions is defined in Gross v. Lowder Realty, 494 So.2d 590 (Ala. 1986). Ikard's complaint did not allege knowledge of any intentional acts by the

Defendant or its employees or agents. The elements of intentional interference with contractual relations are not present in Ikard's action.

CONCLUSION

Jerry W. Ikard asks the Court to hold that his Complaint states a cause of action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and that the discretionary function exception of 28 U.S.C. 2680(a) and the tortious interference with contractual relations and misrepresentation exception of 28 U.S.C. 2680(h) are not present and therefore do not bar his claim.

Wherefore, Appellant prays this Court will reverse the order and final decision appealed from and remand the action for further proceedings.

Respectfully submitted,

Don A. Howard
Uhrig, Munger & Howard

Counsel for Petitioner
3307 Bob Wallace Ave.,
Suite One
Huntsville, AL 35805
(205) 533-2201

Morris J. Brooks, Jr.

Morris J. "Mo" Brooks, Jr.
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636

CERTIFICATE OF SERVICE

I, Don A. Howard, of Uhrig, Munger and Howard, Counsel of Record for Petitioner Jerry W. Ikard, d/b/a Ikard Manufacturing Company, pursuant to Rules 28.2, 28.3, 28.4 and 28.5 of the Rules of the United States Supreme Court, hereby certify that I, on September 27, 1988, served three (3) copies of the original draft of the foregoing Petition for Writ of Certiorari, including the Appendix, upon:

1. United States Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Mr. Frank W. Donaldson

United States Attorney
ATTN: Mr. Herbert J. Lewis, III
Assistant U.S. Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, AL 35203

by mailing said copies of the same to them by depositing the same in a United States Post Office, with first-class (priority), postage pre-paid at the addresses stated above and I further certify that I have this day served three (3) copies of this corrected (pursuant to Rule 33.7) Petition for Writ of Certiorari, including the Appendix, upon:

1. United States Solicitor General
Department of Justice
Washington, D.C. 20530

2. Mr. Frank W. Donaldson
United States Attorney
ATTN: Mr. Herbert J. Lewis, III
Assistant U.S. Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, AL 35203

by mailing said copies of the same to them by depositing the same in a United

States Post Office, with first-class (priority), postage pre-paid at the addresses stated above .

Done this the 20 day of October, 1988.

Don A. Howard
Attorney for Petitioner
Jerry W. Ikard, d/b/a Ikard Manufacturing Company
Uhrig, Howard & Munger
3307 Bob Wallace Ave., Suite One
Huntsville, AL 35805
(205) 533-2201

STATE OF ALABAMA

COUNTY OF MADISON

SWORN TO and subscribed to before me on this the 20th day of October, 1988.

Notary Public
My Comm. Exp.: 5/27/92

88-676

APPENDIX

Supreme Court, U.S.
FILED
SEP 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER:

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JERRY W. IKARD, D/B/A
IKARD MANUFACTURING COMPANY

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Don A. Howard
Uhrig, Munger & Howard
Counsel for Petitioner
3307 Bob Wallace Ave.,
Suite One
Huntsville, AL 35805
(205) 533-2201

Morris "Mo" J. Brooks, Jr.
Co-Counsel for Petitioner
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636

88-676

STATEMENT OF CONTENTS OF APPENDIX

I certify that the contents of the appendix to be filed in conjunction with this Writ of Certiorari, appeal, in accordance with Rules of the Supreme Court of the United States Rule 21 (k) and contains the following portions, and only the following portions, of the record below:

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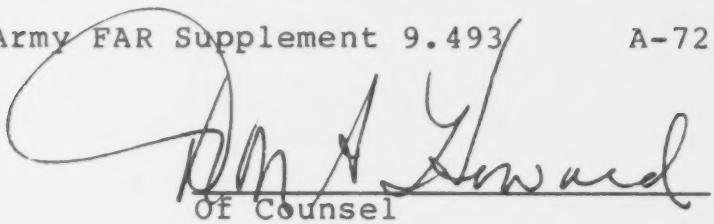

Of Counsel

1. The Order of the 11th Circuit Court of Appeals from which this Writ of Certiorari derives.

Entered June 30, 1988.
Issued as Mandate July 26, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-7043

D.C. Docket No. 87-5267

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee,

Appeal from the United States District Court for the Northern District of Alabama

---

(June 30, 1988)

Before HATCHETT and EDMONDSON, Circuit Judges, and GIBSON*, Senior Circuit

Judge.

PER CURIAM:

AFFIRMED. See Circuit 36-1. "Costs taxed against plaintiff-appellant."

---

*Hon. Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Judgement entered: June 30, 1988
For the Court: Miguel J. Cortez, Clerk

By: Warren A. Godfrey
Deputy Clerk

Issued as Mandate: July 26, 1988

2. The Order of the United States District Court in the Northern District of Alabama, Northeastern Division, dismissing Petitioner's Complaint Entered December 31, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

ORDER

The above entitled civil action brought by plaintiff Jerry W. Ikard d/b/a Ikard manufacturing Company against the defendant United States of America ("United States")[1] is before the Court upon the 12(b)(1) and (6) Motion to Dismiss filed herein by the

defendant United States on August 17, 1987. In support thereof, the United States alleges as follows:

> 2. Plaintiff has failed to satisfy the FTCA requirement of showing that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b).
>
> 3. Alternatively, Plaintiff's allegations all rise out of tortious interference with contract rights and misrepresentation, both of which are expressly excepted from the provisions of the FTCA, 28 U.S.C. Section 2680(h).
>
> 4. Furthermore, plaintiff's allegations involve the Government's exercise of discretionary function and are subject to the exception under 28 U.S.C. Section 2628(a).

and submits memorandum of law in support thereof. Plaintiff filed memorandum brief in opposition to defendant's motion on September 3, 1987.

Upon consideration, the Court is of the opinion that defendant's 12(b)(1) and (6) motion to dismiss is due to be granted for the reasons and alternative reasons stated in the memorandum of law submitted by the United States which the Court hereby adopts as its own. It is therefore

ORDERED that the 12(b)(1) and (6) motion to dismiss of the defendant United States of America be and the same hereby is GRANTED. And it is further

ORDERED that the above entitled civil action be and the same hereby is DISMISSED with costs taxes against plaintiff, for which let execution issue.

DONE AND ORDERED this 31st day of December, 1987.

Signature

E.B. HALTOM, JR.
UNITED STATES
DISTRICT JUDGE

---

1 Plaintiff asserts his claims for relief under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b).

3. Defendant-Respondent's Memorandum of Law Supporting its Motion to Dismiss Which Was Adopted by the Order of the United States District Court in the Northern District of Alabama, Northeastern Division, as Its Own.
Dated August 17, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Plaintiff is the sole owner of a manufacturing company located in Meridianville, Alabama, which produces parts for various federal defense agencies, pursuant to contracts with

the federal government. Plaintiff's primary customer is the United States Army Missile Command at Redstone Arsenal, Alabama. On June 16, 1987, Plaintiff filed the present action against the United States seeking monetary damages. The complaint alleges de facto debarment, inequitable debarment and suspension, negligent failure to comply with the Small Business Act and Federal Acquisition Regulations, interference with prospective advantage, and delayed processing of a security clearance by various unnamed employees of the federal government. Plaintiff seeks recovery under the Federal Tort Claims Act (FTCA), 28 U.S.C. Section 1346(b). For the reasons set out below, defendant respectfully submits

that plaintiff has failed to comply with the FTCA, in that he has not shown that the United States, if a private person, would be liable to plaintiff under Alabama law. Alternatively, his action is barred by statutory exceptions to the FTCA, 28 U.S.C. Sections 2680(a) and (h).

The FTCA states, in pertinent part, that the district court shall have the jurisdiction over

> "...civil actions on claims against the United States for money damages for injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. Section 1346(b)." (emphasis added.)

The plaintiff alleges that the government's actions constituted

negligence per se, interference with prospective economic advantage, misrepresentation and unconstitutional denial of due process. However, before plaintiff can proceed with this action, plaintiff must allege a tort cognizable under Alabama Law. 28 U.S.C. Section 1346(b), supra. Defendant submits that plaintiff has failed to state such a cognizable claim.

Plaintiff's primary contention is that he was "black-listed" and debarred from the list of eligible government contractors as a result of the government's violations of applicable federal procurement regulations, and that these violations constitute negligence and negligence per se.

In Art Metal-USA, Inc. v. United States, 753 F.2d 1151 (D.C. Cir. 1985), the plaintiff contended that it had been unlawfully debarred from further government contracts. Specifically, it alleged, as in the present case, that government officials had failed to comply with procedural requirements set forth in federal debarment regulations. The District of Columbia Circuit stated:

> "We begin our analysis with the well- established principle that the violation of a federal statute or regulation by government officials does not of itself create a cause of action under the FTCA. See Canadian Transport Co. v. United States, 663 F.2d 1081, 1091 (D.C.Cir. 1980) ("Not every violation by the government of its regulations will give rise to an action under the Tort Claims Act.") See also Sellfors v. United States, 697 F.2d 1362, 1365-67 (11th Cir. 1983) (violation of a federal regulation does not automatically invoke state law principles of negligence per se), cert. denied, _____ U.S. _____, 104

S.Ct. 3571, 82 L.Ed.2d 870 (1984); Schindler v. United States, 661 F.2d 552, 560 (6th Cir. 1981) ("usually the federal regulatory statute is not the source of a private right of action"); United Scottish Insurance Co. v. United States, 614 F.2d 188, 194 n.4 (9th Cir. 1987) ("[T]he existence of a federal statutory duty does not of itself create a duty to be vindicated by the Act."), aff'd after remand, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, _____ U.S. _____, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984); Zabala Clemente v. United States, 567 F.2d 1140, 1149 (1st Cir. 1977) ("[E]ven where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability."), cert. denied, 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978); United States v. Smith, 324 F.2d 622, 624-25 (5th Cir. 1963)". "This is because the FTCA, by its terms, does not create new causes of action; rather, it makes the United States liable in accordance with applicable local tort law. Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978). Duties set forth in federal law do not, therefore, automatically create duties cognizable under local tort law. The pertinent inquiry is whether the duties set forth in the

federal law are analogous to those imposed under local tort law. See Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957)."

Art Metal at 1157-58.

In affirming the lower court's dismissal of Art Metal's complaint for failure to state a claim under the FTCA, the District of Columbia Circuit found

"...that GSA officials failed to give Art Metal the process due it under the procurement regulations. Because the regulations do not embody duties recognized under District of Columbia tort law, however, they do not assist Art Metal in this FTCA action. An examination of the regulations indicates that they essentially impose duties on GSA officials to deal fairly with government contractors. Moreover, the "fairness duties" are required of the government as a government under the due process clause of the United States Constitution. See Gonzales v. Freeman, 334 F.2d 570 (D.C.Cir. 1964). As Art Metal itself recognizes, the regulations are

> "designed to protect contractors' due process rights, liberty interests, and economic interests from an arbitrary, capricious, unfair, or incorrect debarment." Brief for Appellant at 33. These constitutional rights are guaranteed under federal law. Thus an alleged violation of these rights is not remediable under the FTCA. Brown v. United States, 653 F.2d 196 (5th Cir. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1920, 72 L.Ed.2d 440 (1982). The FTCA's local law requirement may not be circumvented merely by casting the alleged constitutional wrong as negligence."

Art Metal, at 1160.

Similarly, defendant contends the federal regulations cited by plaintiff in his complaint do not embody duties recognized under Alabama tort law.

In Cecile Industries, Inc. v. United States, 793 F.2d 97 (3rd Cir. 1986) the plaintiff, a clothing and equipment manufacturer for agencies of the federal government, brought an action against the United States under

the FTCA contending that an agency of the Department of Defense subjected them to a de facto debarment from bidding for contracts. They asserted, again as in the instant case, that the agency failed to abide by the applicable debarment regulations, thereby depriving plaintiff of due process.

The Third Circuit in Cecile, reiterated the well-established principle that a claim under the FTCA may not be based on alleged breaches of a duty arising solely out of federal law when there is no corresponding duty under state tort law. Id. at 99.

The plaintiffs in Cecile argued, however, that the government's violation of the applicable federal

regulations constituted negligence per se, citing as support Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975). The Court stated that the failure to follow a federal regulation may be negligence per se only if, under state law criteria, it would be considered negligence per se. Cecile, at 99.

The Cecile Court noted that in Myers, the parties had never addressed whether a violation of federal regulations would be negligence per se under state law, and that the Myers court remanded that case to the district court for such a determination. In Cecile, however, the parties addressed the state law on the theory of negligence per se. The Cecile Court noted that these cases

involved statutes and regulations in the traditional negligence context of automobile and industrial accidents. The Court, finding that a violation of the federal regulations was not negligence per se under state law, affirmed the district court's dismissal for lack of subject matter jurisdiction. A review of Alabama law reveals that the theory of negligence per se is applied only in traffic violation cases; thus, violations of federal regulations would not be negligence per se under Alabama law and would not provide a basis for jurisdiction under the FTCA under Alabama law and would not provide a basis for jurisdiction under the FTCA.

It appears that plaintiff alleges that the government has committed

constitutional torts by denial or equal protection and due process under the law.

> "Federal constitutional torts, however, are not within the scope of the FTCA. That statute waives the sovereign immunity of the United States for the tortious acts of its employees only "if such torts committed in the employ of a private person would have given rise to liability under state law..." By definition, constitutional torts are not based on state law.
>
> "[T]he waiver of sovereign immunity contained in [the FTCA] is limited to a tort cause of action cognizable under state law".

McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied 107 S.Ct. 883 (1987). See also, Boda v. United States, 698 F.2d 1174, 1176 (11th Cir. 1983).

Plaintiff also alleges misrepresentation by government employees in regard to his company's contract performance record. Any

claim for misrepresentation is expressly barred under the Federal Tort Claims Act. 28 U.S.C. Section 2680(h).

Defendant submits, however, that the true essence of plaintiff's complaint is a claim for damages for the government's alleged tortious interference of plaintiff's contract rights. Plaintiff specifically charges that the government's actions interfered with his prospective economic advantage. Tortious interference of contract and tortious interference with prospective economic advantage are one in the same, however, and both are barred by the FTCA. 28 U.S.C. Section 2680(h).

> "To hold that interference with prospective advantage does not arise out of interference with contract rights under section 2680(h) would

> subject the government to liability if its employees interfered with the plaintiff's mere expectation of entering a contract, but not if they interfered with a contract already in existence. Such a result would be illogical and contrary to the 'words and reason of the exception.' Kosak v. United States, ___ U.S. ___, 104 S.Ct. 1519, 1523 n.9, 79 L.Ed.2d 860 (1984) (citation omitted). See 2. L. Jayson, Handling Federal Tort Claims Section 260.06 13-105 (1984). We therefore hold, as has nearly every court that has addressed this issue, that Art Metal's claims for interference with prospective advantage are barred as claims arising out of interference with contract rights."

Art Metal, at 1155.

Finally, the defendant contends that decisions with regard to government contracting involved the exercise of a discretionary function; therefore, any claim against the government based on such decisions is expressly barred under Section 2680(a) of the FTCA.

In conclusion, defendant contends

that the plaintiff has not satisfied the requirement of showing that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b). "[S]urely a litigant cannot circumvent the [FTCA] by the simple expedient of drafting in terms of negligence a complaint that in reality is a claim as to which the United States remains immunized." Johnson v. United States, 547 F.2d 688, 691-92 (D.C.Cir. 1976). Therefore, defendant respectfully requests this Court to dismiss plaintiff's action for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), in that the allegations of the complaint,

misrepresentation and tortious interference with contract rights, are excepted from the provisions of the FTCA. 28 U.S.C. Section 2680(h). In the alternative, defendant respectfully requests this Court to dismiss plaintiff's action for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6), in that the allegations of the complaint do not state a tort under Alabama law as required by the FTCA. 28 U.S.C. Section 1346(b).

FRANK W. DONALDSON
United States Attorney

Signature
HERBERT J. LEWIS, III
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of

the foregoing has been served upon the following by mailing same by First Class United States mail, properly addressed and postage prepaid on the 17th day of August, 1987:

Don A. Howard, Esquire
3307 Bob Wallace Avenue,
Suite One
Huntsville, AL 35805

Signature
HERBERT J. LEWIS, III
Assistant United States
Attorney

4. Petitioner's Complaint in the United States District Court in the Northern District of Alabama, Northeastern Division Filed June 16, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

COMPLAINT

BASIS FOR JURISDICTION

1. This action arises under 28 U.S.C. Section 1346(b), commonly known as the Federal Tort Claims Act, as hereinafter more fully appears.

FACTS

2. Plaintiff resides in Meridianville, Madison County,

Alabama, and is the sole owner of Ikard Manufacturing Company, also located in Meridianville, Alabama. Ikard Manufacturing Company produces and manufactures items and products primarily to the United States Army Missile Command located at Redstone Arsenal, Alabama. By virtue of, and in reliance upon, an approximate 15 to 20 year history of producing parts for the United States Army and establishing its operations to meet the unique and stringent requirements of Department of Defense Agencies, Ikard Manufacturing Company's primary customer is the United States Army Missile Command at Redstone Arsenal, Alabama.

3. This action is a result of the wrongful de facto debarment of

both Jerry W. Ikard and Ikard Manufacturing Company from at least 1981, the wrongful suspension of Ikard Manufacturing Company and Jerry W. Ikard dated June 18, 1984 and received on or about June 20, 1984, the wrongful debarment of Ikard Manufacturing and Jerry Ikard on January 10, 1985, the wrongful cancellation of the security clearances of Ikard Manufacturing Company and Jerry W. Ikard, and the interference with prospective advantage of Jerry W. Ikard and Ikard Manufacturing Company by officers, employees and attorneys of the Untied States Army, a number of whom are employees and attorneys of the U.S. Army Missile Command, and employees of the Defense Contract Administration

Service (DCAS) of the Defense Logistics Agency (DLA).

4. In late 1981, a list was promulgated by employees of the Procurement and Production Directorate of the U.S. Army Missile Command which contained the names of contractors alleged to be "problem contractors." This list contained the name of Ikard manufacturing Company. Supervisors of personnel distributing this list told their employees to avoid awarding contracts to the firms listed if at all possible. Such promulgation of this list, and the accompanying instructions, is in violation of Subpart 9.4 of the Federal Acquisition Regulation (FAR) and of the Defense Acquisition Regulation (DAR), the procurement regulations preceding the

FAR.

5. In compiling information and data on which the U.S. Army Missile Command based its recommendation to the Army Debarring Official to suspend and debar Ikard Manufacturing Company, employees of that Command negligently withheld relevant material evidence from both the Army Debarring Official and Ikard Manufacturing Company and its attorneys. The evidence withheld demonstrated that other U.S. Army Missile Command Contractors had performance records and contract delinquency histories similar to or worse than Ikard Manufacturing Company. It also showed that Ikard manufacturing Company was singled our for an excessively large number of pre-award surveys as compared to other

U.S. Army Missile Command Contractors with similar performance records. In best cases, Ikard manufacturing Company received almost 1000% (a magnitude of 10 times) more pre-award surveys than the contractor with the next largest number of surveys. These pre-award surveys contributed to Ikard Manufacturing Company's delinquency rate due to the need to expend scarce management production time to their accomplishment. On information and belief, Army Missile Command employees negligently withheld such relevant information included the attorneys of that Command.

6. When recommending a course of action to the Army Debarring Official in regard to Ikard Manufacturing Company's request to reconsider its

duration of debarment, U.S. Army Missile Command employees and attorneys negligently gave erroneous information to the Army Debarring Official in regard to Ikard Manufacturing Company's performance history since January 10, 1985. A number of contracts listed as terminated for default or scheduled for default termination, were, in fact, not. In addition, a large percentage of those contracts actually defaulted were of dubious legality.

7. Ikard Manufacturing Company and Jerry W. Ikard were suspended and debarred pursuant to official U.S. Army Administrative hearings for a period of nineteen (19) months. This period of time is excessive when compared to those periods of

suspension and debarment of certain large business firms, who were alleged to have defrauded the United States of America. Ikard Manufacturing Company's alleged wrongs dealt with timely delivery. Several of Ikard Manufacturing Company's small and large business competitors with similar or worse delinquency records were not and have not been either suspended or debarred.

8. Under 15 U.S.C. Section 637(b)(7), the Small Business Administration is the sole and final determinant of the responsibility of small business concerns. In recommending the debarment of Ikard Manufacturing Company and in making the decision to debar Ikard Manufacturing Company, U.S. Army

officials and employees specifically found and determined Ikard Manufacturing Company and Jerry W. Ikard to be nonresponsible as Government contractors. U.S. Army Missile Command employees and attorneys negligently failed to forward their debarment recommendation and finding of nonresponsibility to the Small Business Administration for its final determination of the responsibility of Ikard Manufacturing Company and Jerry W. Ikard.

9. In May, 1985, the Defense Investigative Service invalidated the security clearances of Jerry W. Ikard and Ikard Manufacturing Company. In October, 1985, they were cancelled. The invalidation and cancellation was based upon information received from

the U.S. Army Missile Command that, as of May 14, 1985, all of Ikard Manufacturing Company's contracts with the U.S. Army Missile Command had either been delivered or terminated for default. This information was, as the Army's own records indicate, in error. Ikard Manufacturing Company had active contracts throughout its debarment. The submission of erroneous information prohibited Ikard Manufacturing Company from receiving a contract form a prime contractor with whom negotiations were being conducted.

10. Ikard Manufacturing Company and Jerry W. Ikard's security clearances were not restored until June 2, 1986, though Ikard Manufacturing Company was bidding on

classified solicitations and had requested its restoration on January 10, 1986. Other contractors, with no history of a security clearance, had their clearances processed and approved in a matter of days as opposed to Ikard Manufacturing Company's delay of four (4) months.

11. In December, 1986, pursuant to a review of Request for Proposals (RFP) DAAH01-87-R-0091, in accordance with applicable regulations, the Small Business Administration (SBA) Procurement Center Representative for the U.S. Army Missile Command recommended that Ikard Manufacturing Company be solicited for the Army's requirement for repair and rebuild of 332 TOW-2 Missile System Cable Assemblies. The SBA Procurement

Center Representative included Ikard Manufacturing Company's name on a recommended Small Business Source List for the referenced solicitation in order to give Ikard Manufacturing Company the opportunity to bid and propose for that requirement. The Contract Specialist for the U.S. Army Missile Command stated that Ikard Manufacturing Company would not be solicited for the requirement because Ikard Manufacturing Company had been "black-listed." After the Procurement Center Representative told the Contract Specialist that the period of Ikard Manufacturing Company's formal debarment had ended, the Contract Specialist stated that Ikard Manufacturing Company was on the U.S. Army Missile Command Contractors

Requiring Special Attention (CRSA) list and the DCAS Contractor Alert List (CAL). Correspondence pertaining to these lists which has been issued by the Army and DCAS state that neither list is to be used to deny contract awards to contractors or to be utilized for determinations of whether contractors are responsible. Pursuant to the Small Business Act, only the Small Business Administration may determine the responsibility of Small Business Contractors. The agencies promulgating the lists have stated in correspondence that the purpose of such lists is to bring attention to particular contractors and require a review by higher officials. After review of the Contract Specialist's actions by her

supervisor, a U.S. Army Missile Command Contracting Officer, Ikard Manufacturing Company's name was removed from the list of contractors to be given an opportunity to bid on this requirement. This action, in part, prompted the SBA Procurement Center Representative to forward a letter to his regional office detailing "black-listing" of certain small business contractors by the U.S. Army Missile Command and of the pervasive fear of retribution by small business contractors who attempted to protect their rights. By memorandum dated January 30, 1987, the U.S. Army Missile Command stated that the CRSA List was not a "black-list" and that "the program should not be thought of nor referred to in that light." The

memorandum also warned against viewing the "CRSA program as a disciplinary action." By memorandum dated September 3, 1986, Ikard Manufacturing Company had bee removed from the CRSA List because of "performance improvements."

STATEMENT OF LEGAL POSITION

12. Plaintiff avers that the "black-listing" and de facto debarment of Ikard Manufacturing Company and Jerry W. Ikard deprive it of property and liberty interest without due process of law as required by Article I, Section 6 of the Constitution of Alabama of 1901 and the Fifth Amendment of the United States Constitution, and violate Federal Procurement Regulations, particularly Subpart 9.4 of the Federal Acquisition

Regulations (FAR), and the Small Business Act, and that this violation of law is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

13. Plaintiff avers that the negligent withholding of evidence and submission of erroneous information in regard to the suspension and debarment of Ikard Manufacturing Company deprived it of property without due process of law, a right protected under Article I, Section 6 of the Alabama Constitution of 1901 and the Fifth Amendment of the United States Constitution. Further, Plaintiff avers that the negligent withholding of relevant evidence deprived the debarment hearing of any fundamental fairness and prevented it from meeting

the requirement of a due process hearing, and that this violation of law is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

14. Plaintiff avers that the inequitable debarment and suspension of Ikard Manufacturing Company for a period of nineteen (19) months as opposed to shorter periods of time or no debarment of Ikard Manufacturing Company's competitors with similar or worse delinquency records is a violation of the Equal Protection of Laws as provisions of Sections 1, 6 and 22 of Article I of the Alabama Constitution of 1901, and Subpart 9.4 of the Federal Acquisition Regulations (FAR), and is error, and constitutes negligence and negligence per se under

the laws of the State of Alabama.

15. Plaintiff avers that the negligent failure of employees and officials of the U.S. Army to forward their determination of the nonresponsibility of Ikard Manufacturing Company and Jerry W. Ikard to the Small Business Administration (SBA) is a violation of the Small Business Act, and the Federal Acquisition Regulations, and is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

16. Plaintiff avers that the negligence and submission of erroneous information to the Defense Investigative Service prohibited Ikard Manufacturing Company from receiving a contract from a Prime Contractor with

whom negotiations were being conducted and that such negligence constitutes interference with prospective advantage.

17. Plaintiff avers that the delay and negligence in diligently processing Ikard Manufacturing Company's security clearance is a violation of the Equal Protection of the Laws provisions of Article I, Sections 1, 6, and 22 of the Alabama Constitution of 1901, the Fifth Amendment of the United States Constitution and is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

18. Plaintiff avers that the negligence complained of hereinabove is both the cause in fact and

proximate cause of property damage to Ikard Manufacturing Company and Jerry W. Ikard. The employees and officers of the U.S. Army and the Defense Contract Administration Service (DCAS) of the Defense Logistics Agency (DLA) whose actions are alleged to be negligent herein were acting in the scope of their employment by Defendant.

19. Plaintiff avers that the employees and officers of the U.S. Army and the Defense Contract Administration Service (DCAS) of the Defense Logistics Agency (DLA) whose actions are complained of hereinabove failed to exercise the degree of care required or prescribed by the laws of the State of Alabama.

20. Plaintiff avers that the

negligence complained of herein, which were acts or omissions of attorneys who were employed by or were officers of the U.S. Army, is a violation of Section 34-3-20(1) of the Code of Alabama (1975), and, as such, constitutes negligence and negligence per se under the laws of the state of Alabama.

21. Plaintiff avers that the acts or omissions on the part of Defendant which were acts or omissions of attorneys who were employed by or were officers of the U.S. Army were error, constituted negligence, and departed from and fell below the standard of care required of attorneys practicing law in Madison County, Alabama, or in similar areas.

22. Plaintiff avers that

Defendant, and its employees, officers and attorneys, owed Plaintiff the duty to comply with all regulations, statutes and Constitutional provisions applicable to determinations of responsibility, suspension, debarment, and Federal procurement.

23. Plaintiff presented his claim to the United States Army on June 18, 1986, which claim was denied by letter dated December 31, 1986.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiff demands judgment against the Defendant for the sum of Five Million Dollars ($5,000,000.00) and costs.

Signature

DON A. HOWARD
Attorney for Plaintiff
UHRIG, MUNGER & HOWARD
3307 Bob Wallace Ave.,
Suite One

Huntsville, AL 35805
(205) 533-2201

Signature
Morris J. Brooks, Jr.
Attorney for Plaintiff
9009 Randall Rd.
Huntsville, AL 35802

Plaintiff demands trial by jury.

Signature
DON A. HOWARD
Attorney for Plaintiff

Signature
Morris J. Brooks, Jr.
Attorney for Plaintiff

5. Defendant-Respondent's Motion to Dismiss in the United States District Court in the Northern District of Alabama, Northeastern Division. Filed August 17, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

DEFENDANT'S MOTION TO DISMISS

Comes now the defendant United States of America, by and through its attorney, the United States Attorney for the Northern District of Alabama, and pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, moves this Honorable Court to dismiss

this action, and in support hereof states as follows:

1. Plaintiff asserts jurisdiction under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b).

2. Plaintiff has failed to satisfy the FTCA requirement of showing that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b).

3. Alternatively, Plaintiff's allegations all rise out of tortious interference with contract rights and misrepresentation, both of which are expressly excepted from the provisions of the FTCA, 28 U.S.C. Section 2680(h).

4. Furthermore, plaintiff's

allegations involve the Government's exercise of a discretionary function and are subject to the exception under 28 U.S.C. Section 2680(a).

WHEREFORE, for the foregoing reasons, it is respectfully submitted that plaintiff's suit be dismissed. The Court is respectfully referred to a memorandum of law submitted in support hereof.

FRANK W. DONALDSON
United States Attorney

Signature
HERBERT J. LEWIS, III
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by mailing same by First Class United States mail, properly addressed and postage prepaid on the 17th day of August, 1987:

Don A. Howard, Esquire
3307 Bob Wallace Avenue,
Suite One
Huntsville, AL 35805

Signature

HERBERT J. LEWIS, III
Assistant United States
Attorney

6. Lengthy Statutes and Federal Acquisition Regulations

15 U.S.C. 637(a)(1):

(1) It shall be the duty of the Administration and it is empowered, whenever it determines such action is necessary or appropriate---

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific

Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department of agency by the Administrator. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(B) to enter into contracts with such agency as shall be designated by

the President, to furnish articles, equipment, supplies, services, or materials, or to perform construction work for such agency. In any case in which the Administration certifies to any officer of such agency having procurement powers that the Administration is competent and responsible to perform any specific procurement contract to be let by any such officer, such officer shall let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. If the Administration and such procurement officer fail to agree on such terms and conditions, either the Administration or such officer shall

promptly notify, in writing, the head of such agency. The head of such agency shall have five days (exclusive of Saturdays, Sundays, and legal holidays) to establish the terms and conditions upon which such procurement contract may be let to the Administration, and shall communicate in writing to the Administration the terms and conditions so established. Within five days (exclusive of Saturdays, Sundays, and legal holidays) after the receipt of such written communication, the Administration shall decide whether to perform such procurement contract or withdraw its prior certification that the Administration is competent and responsible to perform such contract; and

(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts. No contract may be entered into under subparagraph (B) after September 30, 1988.

15 U.S.C. 637(b)(7):

(b) It shall also be the duty of the Administration and it is empowered,

whenever it determines such action is necessary---

(7)(A) to certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small-business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such

contract without referring the matter for a final disposition to the Administration.

(B) If a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to the provisions of section 35(a) of Title 41, he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final disposition, in which case the Administration may certify the small business concern only if the Secretary

of Labor finds the small business concern not to be in violation.

(C) In any case in which a small business concern or group of such concerns has been certified by the Administration to be a responsible or competent Government contractor as top a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and shall let such Government contract to such concern or group of concerns without requiring it to meet any other requirement of responsibility or eligibility.

Notwithstanding the first sentence of this subparagraph, the Administration may not establish an

exemption from referral or notification or refuse to accept a referral or notification from a Government procurement officer made pursuant to subparagraph (A) or (B) or this paragraph, but nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed.

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United

States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680(a):

The provisions of this chapter and section 1346(b) of this title shall not apply to---

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in

the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. 2680(h):

The provisions of this chapter and section 1346(b) of this title shall not apply to---

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or

omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Title 48, Code of Federal Regulations: FAR 9.402(b):

The serious nature of debarment and

suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

FAR 9.406-2 Causes for Debarment:

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) Conviction of or civil judgment for--(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as--

(1) Willful failure to perform in accordance with the terms of one or

more contracts; or

(2) A history of failure to perform, or of unsatisfactory performance or, one or more contracts.

(c) Any other cause or so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor FAR 9.406-3(b) Procedures. Decision-making process.

(1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative,

information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also--

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

FAR 9.407-2 Causes for Suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, or--

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the

present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

Title 48, Code of Federal Regulations: DOD FAR Supplement 9.472-2: Contents of Reports.

Each report prepared pursuant to this subsection shall contain the name and telephone number of the individual assigned to the case as the point of contact for the activity making the

report, and shall include substantially the following information, where available:

(a) name and address of the contractor;

(b) names of the principal officers, partners, owners, or managers;

(c) all known affiliates, subsidiaries, or parent firms, and the nature of the affiliation;

(d) description of the contract or contracts concerned, including the contract number, and all office identifying numbers of symbols, the amount of each contract, the degree of completion, the amount paid the contractor and the amount still due, and the percentage of work to be completed;

(e) the status of the vouchers;

(f) whether the contract has been assigned pursuant to the Assignment of Claims Act, and if so assigned, the name and address of the assignee and a copy of the assignment;

(g) whether any other contracts are outstanding with the contractor or any of his affiliates, and if so, the amount of such contracts, whether they are assigned pursuant to the Assignment of Claims Act, and the amounts paid or due on such contracts;

(h) a complete summary of all pertinent evidence;

(i) a recommendation as to the continuation of all current contracts with a full explanation of the reason for such recommendation, or if no recommendation is made, the reason therefor;

(j) an estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate;

(k) the comments and recommendations of the contracting officer and of each successive echelon as to (1) whether the contractor should be suspended or debarred, (2) whether any limitations should be applied to such action, and (3) the period of any debarment; and,

(l) as an enclosure, a copy of the contract (or contracts) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation, such as affidavits, copies of investigative

reports and certified copies of indictments and judgments.

Army FAR Supplement 9.493. Debarment and Suspension Procedures.

(a) Purpose. The purpose of these procedures is to ensure fair and uniform treatment of contractors suspended or proposed for debarment by the Army. These procedures supplement those established in Part 9, Subpart 9.4 of the Federal Acquisition Regulation (FAR).

(b) Notification. Contractors will be notified of suspension or proposed debarment in accordance with FAR 9.406-3(c) and 9.407-3(c). Contractors routinely will be furnished a copy of the entire record which formed the basis for the decision by the Assistant Judge

Advocate General for Military Law (AJAG). If there is reason to withhold from the contractor any portion of that record, the contractor will be informed of what is withheld and the reasons for such withholding.

(c) Nature of Proceeding. There are two distinct proceedings which may be involved in the suspension or debarment process. The first is the presentation of matters in opposition to the suspension or proposed debarment by the contractor. The second is fact-finding, which occurs only in cases in which the contractor's presentation of matters in opposition raises a genuine dispute over material facts. In a suspension action based upon an indictment and in a proposed debarment action based upon

a conviction, there is no regulatory right to a fact-finding proceeding, as the fact of the indictment or conviction is sufficient basis for the proposed action. To the extent that the proposed action stems from the contractor being an affiliate of the individual or firm indicted or convicted, fact-finding is permitted, but only if a genuine dispute of fact is raised as to the question of affiliation.

(d) Presentation of Matters in Opposition.

(1) In accordance with FAR 9.406-3(c) and 9.407-3(c), matters in opposition may be presented in person, in writing, or through a representative. Matters in opposition may be presented through any

combination of the foregoing methods, but if a contractor desires to present matters in person or through a representative, any written matters must be delivered at least five working days in advance of the oral presentation. With the exception of the foregoing, all matters in opposition must be presented in a single proceeding. Such a proceeding is nonadversarial in nature, although the AJAG or any person he designates may ask questions of the person making or assisting in making the presentation. The presentation will be scheduled for a date which is within 10 working days of the date requested by the contractor. In accordance with FAR 9.406-3(c) and 9.407-3(c), the contractor has 30 days

from receipt of the notice of suspension or proposed debarment to submit matters in opposition.

(2) A verbatim transcript of the oral presentation will be prepared. A copy will be made available to the contractor at his request.

(3) The opportunity to present matters in opposition to debarment includes the right to present matters concerning the duration of debarment.

(4) Within five working days following the submission of matters in opposition, the contractor may submit to AJAG a written statement outlining the material fact or facts, if any, believed to be in dispute.

(e) Fact-Finding.

(1) In cases in which fact-finding is authorized, AJAG will determine

within 30 working days of the contractor's presentation of matters in opposition whether the presentation has raised a genuine dispute over one or more material facts. He will determine the material fact or facts, if any, as to which a genuine dispute has been raised. Upon determining such a dispute exists, he will appoint a military judge made available by the United States Army Trial Judiciary to conduct a fact-finding proceeding, unless such proceeding is unnecessary because AJAG has decided against debarment or continued suspension based upon the contractor's presentation of matters before him.

(2) The designated military judge will establish a date for a fact-finding hearing. This date will be

within 45 working days of the date of the contractor's presentation of matters in opposition, unless the contractor requests a latter date. The delayed hearing will occur within 60 working days of the date of the contractor's presentation of matters in opposition.

(3) Wile formal rules of evidence do not apply in fact-finding proceedings, certain basic principles will be observed:

(A) The military judge, in advance of the proceeding, will receive from AJAG a description of the general nature of the case and the material fact or facts he has determined to be in dispute.

(B) The proceeding before the military judge is limited to a

resolution of the fact or facts in dispute as determined by AJAG.

(C) The burden is on the government to establish the disputed fact or facts by a preponderance of the evidence.

(D) While no subpoena power exists to compel attendance of witnesses, Department of Defense employees whose testimony is critical to establishing the fact or facts in dispute will testify in person if they are employed in the area in which the fact-finding proceeding takes place and are otherwise available to testify. If such employees are not available to testify, their sworn statements may be used in lieu of their testimony and will be given appropriate weight by the military judge. The military

judge's decision on the question of availability is final.

(E) Hearsay evidence may be used and will be given appropriate weight by the military judge.

(F) All witnesses, whether presented by the government or the contractor will be placed under oath and are subject to cross-examination.

(G) Administrative arrangements, costs, and fees for all witnesses, including Department of Defense employees, desired by the contractor are the contractor's sole responsibility. Permission for Department of Defense employees to appear and testify will not be unreasonably withheld.

(4) A verbatim transcript of the proceedings will be prepared. A copy

will be made available to the contractor at his request.

(5) The military judge will prepare written findings of fact, limited to the fact or facts in dispute, and provide them along with a copy of the transcript to AJAG within 15 working days of the conclusion of the proceedings. A copy of the findings of fact will be provided to the contractor.

(6) AJAG will notify the contractor of debarment or continued suspension within 10 working days of receipt of the findings of fact. His decision will be based upon the entire administrative record.

(f) Time Requirements. All time requirements set forth in these procedures may be extended by AJAG,

but only for good cause.

Supreme Court, U.S.
FILED
DEC 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-676

In the Supreme Court of the United States

OCTOBER TERM, 1988

JERRY W. IKARD, D/B/A IKARD MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
JOHN F. CORDES
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTIONS PRESENTED

This is an action against the United States under the Federal Tort Claims Act. The questions presented are:

1. Whether the United States, if a private person, would be liable under Alabama law for wrongfully refusing to do business with petitioner.

2. Whether, in any event, petitioner's claims that federal employees made negligent misrepresentations to a debarring official and discriminated against him in awarding contracts are precluded by 28 U.S.C. 2680(h), which prevents recovery for "[a]ny claim arising out of * * * misrepresentation" and "interference with contract rights," or the discretionary function exception, 28 U.S.C. 2680(a).

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1-A2) is reported at 853 F.2d 931 (Table). The order of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1988. The petition for a writ of certiorari was filed on September 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Jerry Ikard is the sole owner of Ikard Manufacturing Company, whose primary customer is the Army Missile Command (MICOM) at Redstone Arsenal,

Alabama. Petitioner's complaint alleged that in late 1981 MICOM put Ikard on a list of "problem" contractors to be avoided if at all possible. His complaint then alleged that in 1984 the company was suspended and debarred, after an administrative hearing, for a period of 19 months because it had been delinquent in performing many contracts. Petitioner asserted that in compiling the information upon which MICOM based its recommendation that Ikard be debarred, MICOM employees, including attorneys, negligently withheld evidence showing that there were other contractors with similar or worse delinquency records that had not been sanctioned. Petitioner claimed that the debarring official also was misled when, after Ikard requested reconsideration of the duration of its debarment, MICOM employees provided information to the official erroneously listing several contracts that had been awarded to Ikard as terminated for default or scheduled for default. The complaint also asserted that the 19-month suspension was excessive compared with suspensions of certain large firms found to have defrauded the United States. Pet. App. A25-A31.

Petitioner's complaint also alleged that Ikard's security clearances were improperly cancelled in 1985 after MICOM employees falsely reported that all of the firm's contracts with MICOM had been either completed or terminated for default. This cancellation allegedly caused Ikard to be denied a contract from a prime contractor with whom negotiations were in progress. Petitioner further alleged that there was a four-month delay in restoring Ikard's security clearance while it was bidding on classified solicitations, whereas contractors with no prior security clearance received them "in a matter of days." Pet. App. A32-A34.

Petitioner's complaint further alleged that in 1987 Ikard was improperly denied the opportunity to bid on a con-

tract for the repair and rebuilding of TOW-2 Missile System Cable Assemblies. Petitioner claimed that after the Small Business Administration recommended that Ikard be considered for the contract, a MICOM contract specialist replied that Ikard would not be solicited because it was on MICOM's Contractors Requiring Special Attention list and the Defense Contract Administration Service alert list, although those lists were not to be used as "black lists." Pet. App. A34-A36.

Petitioner alleged that MICOM's withholding of relevant information in Ikard's debarment proceeding and MICOM's alleged black-listing of Ikard with respect to the TOW-2 contract violated his Fifth Amendment due process right and the analogous clause of the Alabama constitution, as well as the federal acquisition regulations. With respect to the alleged inequality of treatment between Ikard and other firms, the complaint claimed that this was a denial of equal protection under the federal and Alabama constitutions and violated the federal acquisition regulations. To the extent that attorneys were involved in any of the alleged wrongful conduct, petitioner claimed that their actions violated an Alabama statute regulating attorneys. Petitioner claimed that all of the alleged constitutional, statutory, and regulatory violations constituted negligence per se, and sought relief under the Federal Tort Claims Act (FTCA). Pet. App. A38-A44.

2. The district court dismissed petitioner's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Pet. App. A3-A6. In so doing, the district court adopted as its opinion (*id.* at A5) the government's memorandum of law (*id.* at A7-A23) filed in support of its motion to dismiss.

The government's memorandum explained that for petitioner to have a claim under the FTCA, he must allege a tort cognizable under Alabama law (Pet. App. A8-A10).

As in *Art Metal-U.S.A., Inc.* v. *United States,* 753 F.2d 1151. 1159-1160 (D.C. Cir. 1985), an analogous case involving District of Columbia tort law, Alabama tort law imposes no duty to use due care in awarding contracts (Pet. App. A11-A14). In addition, the memorandum noted that under Alabama law negligence per se applies only in traffic violation cases and thus is inapplicable here (*id.* at A17). Insofar as the complaint alleged denials of equal protection and due process, the memorandum, relying on *McCollum* v. *Bolger,* 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987), noted that the FTCA provides no remedy for such constitutional violations (Pet. App. A17-A18).

In addition, the memorandum pointed out that 28 U.S.C. 2680(h) specifically precludes recovery based on misrepresentation and interference with contract rights, and that petitioner's claims all involve allegations that government officials made misrepresentations or that Ikard improperly was denied contracts (Pet. App. A18-A20). Finally, the memorandum noted (*id.* at A20) that decisions regarding the awarding of government contracts involve the exercise of discretion, and argued that claims based on such decisions are expressly barred by 28 U.S.C. 2680(a).

The court of appeals, in a per curiam order, affirmed the district court's dismissal of petitioner's complaint. Pet. App. A1-A2.

ARGUMENT

Petitioner provides no good reason why this Court should consider this case, which primarily involves issues of Alabama law. There is no conflict among the circuits with respect to the questions presented, nor is the dismissal of petitioner's complaint inconsistent with any decision of this Court.

1. As the courts below recognized, the primary defect in petitioner's claim is that there is no authority suggesting that, under Alabama law, a private company that refused to do business with a prospective bidder, even if the refusal was the result of negligence or malpractice, would be subject to a tort action.[1] Since 28 U.S.C. 1346(b) provides that the United States is liable under circumstances where "a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred," that defect is fatal. Whether the courts below, which are presumably expert in Alabama law, erred in their analysis of that law is not a matter warranting this Court's review. See *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976); *MacGregor* v. *State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942).

In any event, there is no merit to petitioner's contentions that the United States, if a private party, would be liable under Alabama law. Petitioner has cited no case, other than traffic cases, involving the application of negligence per se in Alabama. Nor has he provided any authority showing that Alabama courts would allow a plaintiff under analogous circumstances to bring a tort action against a private person alleging a violation of constitutional or statutory rights. In short, petitioner's theories as to comparable Alabama causes of action are so tenuous as not to merit serious consideration, and this is exactly why they were treated summarily by the two courts below.[2]

---

[1] Courts have not been receptive to similar claims under other state laws. See *Cecile Indus., Inc.* v. *United States*, 793 F.2d 97 (3d Cir. 1986) (no analogous Pennsylvania tort); *Art Metal-U.S.A.* (no analogous D.C. tort).

[2] Petitioner's reliance (Pet. 27-29) on *Hatahley* v. *United States*, 351 U.S. 173 (1956), is misplaced. There was no contention there that the government's willful destruction of the plaintiff's horses would not constitute a tort under state law. Rather, the issue was whether the

2. Even if petitioner had a cause of action under Alabama law, his claims would nevertheless be barred by 28 U.S.C. 2680(h). That exception to the FTCA provides that the federal government is not subject to suit in "[a]ny claim arising out of * * * misrepresentation" or "interference with contract rights." Petitioner's suit plainly arises out of such torts, as he alleges that government employees misrepresented various facts to the debarring official in connection with Ikard's 1984 debarment and misrepresented other facts that caused the suspension of Ikard's security clearances in 1985, and all of Ikard's alleged injuries are to prospective contract rights. Accordingly, unlike *Block* v. *Neal,* 460 U.S. 289, 297 (1983), on which petitioner relies (Pet. 56-59), petitioner's misrepresentation and interference with contract rights claims are essential to his negligence claim. See *Art Metal-U.S.A.*, 753 F.2d at 1153-1156. Finally, decisions with respect to the selection and debarment of contractors are matters on which the government exercises discretion, and, as the courts below agreed, at least some of petitioner's contentions are barred by the discretionary function exception. In the absence of a conflict in the circuits, these matters do not warrant review by this Court.

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government's action was nevertheless permitted by federal law (*id.* at 180).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
JOHN F. CORDES
ROBERT D. KAMENSHINE
Attorneys

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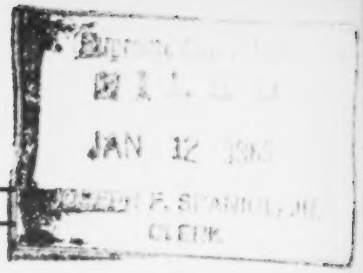

NUMBER: 88-676

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JERRY W. IKARD, D/B/A
IKARD MANUFACTURING COMPANY

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Don A. Howard
Uhrig, Munger & Howard
Counsel for Petitioner
3307 Bob Wallace Ave.,
Suite One
Huntsville, AL 35805
(205) 533-2201

Morris "Mo" J. Brooks, Jr.
Co-Counsel for Petitioner
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636

QUESTIONS PRESENTED FOR REVIEW

This Reply Brief responds to the Questions Presented by the Brief of the United States in Opposition.

1. Whether the United States, if a private person, would be liable under Alabama law for wrongfully refusing to do business with petitioner.

2. Whether, in any event, petitioner's claims that federal employees made negligent misrepresentations to a debarring official discriminated against him in awarding contracts are precluded by 28 U.S.C. 2680(h), which prevents recovery for "[a]ny claim arising out of * * * misrepresentation" and "interference with contract rights," or the discretionary function

exception, 28 U.S.C. 2680(a).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

OPINIONS BELOW

The per curiam order of the court of appeals (Pet.App. A1-A2) is reported at 853 F.2d 931. The order of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1988. The petition for a writ of certiorari was filed on September 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

No provisions additional to those in the Petition for Writ of Certiorari are cited.

STATEMENT

The Statement of the Petition for Writ of Certiorari is adopted herein by reference.

ARGUMENT

Respondent provides no substantive reason why this Court should not consider this case. Respondent cites no

cases indicating Petitioner's argument conflicts with Alabama law.

The thrust of Respondent's argument is that the law is stagnant. Respondent's position, summed up, is: "If a specific rights under specific circumstances have not been asserted or protected in the past, then they should not be in the future."

Respondent's position dictates that every case of first impression must fail for lack of precedence.

Such a stance is repugnant to the enlightened and evolutionary nature of American jurisprudence. It is contrary to landmark cases on desegregation, an accused's right to counsel, cruel and unusual punishment, right to silence, and the like.

It is a stance Petitioner asks this

Court to reject.

1. Respondent argues Petitioner is not entitled to relief as "[T]here is no authority suggesting that, under Alabama law, a private company that refused to do business with a prospective bidder, even if the refusal was the result of negligence or malpractice, would be subject to tort action." (Resp.Brf.Opp. 5).

Respondent's position is contrary to the cases cited by Petitioner on statutory and common law negligence. It is also contrary to Alabama law on negligent violations of Constitutional provisions.

Violations of the Alabama Constitution create a cause of action under the FTCA.

In Alabama, a taking of property

without just compensation is a violation of Article I, Section 23 of the Alabama Constitution and is a tort. Finnell v. Pitts, 132 So. 2 (1930). Damage to property is a taking within the meaning of that section. Id.

In Finnell, state highway officers negligently constructed a highway, thus partially flooding a person's land. The Court held that resulting damage to the property was a taking of property and violated Article I, Section 23, of the Alabama Constitution. The Court held that individual private persons, who were employees of the State of Alabama, were liable in tort for the Constitutional violation even though sovereign immunity barred suit against the State.

Article I, Section 23 of the Alabama Constitution requires just compensation to be paid for damage to or the taking of personal property. Article I, Section 6 of the Alabama Constitution, which guarantees due process and protection of property and liberty interests, subsumes Article I, Section 23 because damage to or taking of property without just compensation is a taking without due process. Engelhardt v. Jenkins, 141 So.2d 193 (Ala. 1962). Thus, in Alabama, a violation of due process rights is tortious conduct. An FTCA cause of action is created when a violation has been made by employees of the United States.

Respondent relies on Art Metal-U.S.A. v. United States, 753 F.2d

1151 (D.C.Cir., 1985) and Cecile Industries, Inc. v. U.S., 611 F.Supp. 97 (3rd Cir. 1986) to claim that "Courts have not been receptive to similar claims under other state laws." (Resp.Brf.Opp. 5, ft.1). Respondent's reliance is misplaced. Respondent does not note that in Art Metal the rights of due process, liberty interests and equal protection were guaranteed by only the United States Constitution; i.e., "Federal Law." In the District of Columbia, unlike Alabama, there is no State Constitution which guarantees those rights. In the District of Columbia, too, there is apparently no tort for a violation of due process rights as is the case in Alabama. See Finnell v. Pitts, supra.

Respondent also does not note that, in Cecile, there was no discussion of whether, under the Pennsylvania Constitution, there were "analogous duties" to those of the Fifth Amendment of the United States Constitution.

Though there may be no recognized cause of action in these jurisdictions for de facto debarment, the same is not true in Alabama. Purely and simply, a de facto debarment or a formal debarment without the requisite safeguards is a deprivation of property and liberty interests without due process of law. Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252, 1259, 1260 (2nd Cir., 1975); Gonzales v. Freeman, 334 F.2d 570, 574, 578, 579 (D.C.Cir. 1964);

See Cibinic and Nash, Formation of Government Contracts, 2nd Ed., 1986, p. 283. As set forth above, in Alabama a violation of one's due process rights as guaranteed by Alabama's Constitution is tortious. Finnell v. Pitts, supra.

2. Respondent further argues the misrepresentation, interference with contractual rights and discretionary function exceptions to the FTCA. Petitioner's Arguments V. and VI. in its Petition for Writ of Certiorari are reiterated.

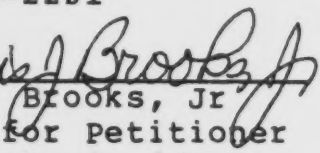
CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Don A. Howard

Attorney for Petitioner
Jerry W. Ikard, d/b/a
Ikard Manufacturing Co.
Uhrig, Howard & Munger
3307 Bob Wallace Ave.,
Suite One
Huntsville, AL 35805
(205) 533-2201



Morris J. Brooks, Jr.
Attorney for Petitioner
Jerry W. Ikard, d/b/a
Ikard Manufacturing Co.
9009 Randall Road
Huntsville, AL 35802
(205) 883-7636